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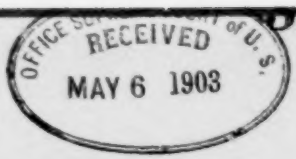

IN THE

Supreme Court

Of the United States.

OCTOBER TERM, 1902.

ROBERT L. WINEBRENNER, *Appellant.*

vs.

EDWARD C. FORNEY, *Appellee.*

No. 409.

PETITION FOR RE-HEARING.

S. H. HARRIS,
J. J. DARLINGTON,
Counsel for Appellant.

PERRY REPUBLICAN PRINT, PERRY, O. T.

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The Appellant in the above entitled cause respectfully petitions this honorable court to withhold and stay the mandate of the court herein, and to grant him a re-hearing of the said cause, and a reversal of the opinion and decision of the court rendered and delivered herein on the 6th day of April, 1903, for the following reasons:

1st. That the court overlooked and ignored the

importance and controling force of the rule of contemporaneous construction of the act and proclamation involved in this cause.

2nd. That the court misconstrued the proclamation of the President, opening the lands in the Cherokee Outlet to settlement, and misconstrued and misapplied the act of congress making provisions for said opening.

3rd. That the court erred in making a distinction between such portions of said Outlet as were reserved from settlement and from which "sooners" entered upon the race and other reservations adjoining the outer boundaries of said country, of the same class and character.

4th. That the court erred in holding and deciding that "the entire tract of country, to be opened to settlement under this proclamation" was other than the said Cherokee Outlet, as described and defined in the session, the act of congress and the said proclamation of the President opening the lands to settlement.

5th. That the court erred in holding and deciding that the first paragraph of that portion of the proclamation defining and locating the one hundred foot strip was in conflict with the second paragraph, and that the said first paragraph was controlling.

6th. That the court erred in holding that there

was any "entire tract of country" except the said Cherokee Outlet, and as defined by said session, act of congress and proclamation.

7th. That the court erred in holding that it would be more equitable to suppose that the President intended to place the one hundred foot reservation along the western boundary of the Ponca Reservation, on account of the great multitude of people who desired to make the race, in face of the conceded and established fact that such persons were not permitted, either by the Secretary of War, the Secretary of the Interior, the Commissioner of the General Land Office or the officers directly in charge of the opening, to make entry from that point.

In support of the foregoing petition and motion counsel for Appellant respectfully submit the accompanying brief and suggestions.

The undersigned counsel for Appellant in the cause herein-before entitled hereby certify that in their opinion the grounds set forth in the foregoing petition for re-hearing are valid and sufficient to justify and require such re-hearing.

S. H. HARRIS,
J. J. DARLINGTON,
Counsel for Appellant.

BRIEF.

1st. If we admit that there is a conflict or uncertainty in the proclamation with reference to the location of a one hundred foot strip around the country to be opened to settlement, we suggest that the adoption of an equitable rule of construction by the executive departments of the United States in applying the commands and directions of the President would be highly proper, and that is what all the officers of the government having anything to do with the matter, pretended and attempted to do. This construction prevented all persons who were disposed to respect the lawfully constituted authority of the United States from entering from the Indian Reservations in question. The construction of the law before and at the time of the race for homes was widely published and universally understood, and it has been conceded at all stages of the litigation that more than nine hundred and ninety-nine per cent of those desiring lands respected and obeyed the law as construed by the officers of the government whose duty it was to then make application of it. We respectfully submit that to determine an equitable rule as laid down by the court in the opinion, without regard to this contemporaneous construction, and almost ten years after the time when these home

seekers could have the benefits of an application of such rule, not only denies to the Appellant and others who, like him, respected the law, an equal right to acquire a home, but denies to the Appellee the lands, enriched by ten years of labor and improvement. We know of no other instance where this government has visited such penalties upon those of its citizens who respected its laws as construed by its officers charged with that duty.

As to the rule of contemporaneous construction see authorities cited in original briefs.

2nd. We submit that there is no conflict in the proclamation, and if such conflict existed the second clause, which is evidently explanatory of the first, would be controlling.

If all provisions in reference to the one hundred foot reservation were omitted from the proclamation, there would be no difficulty in determining the "tract of country" opened to settlement. It is positively and definitely described in the session, the act of congress, and the proclamation, which reiterates the description. The exception of certain reservations would not change the general description of the entire tract, and if all these reservations were not within the entire tract *what cause or reason would there be for excepting them?* The one hundred feet were opened in advance for the sole purpose of allowing

persons to congregate upon the borders of the country. It did not change those borders or pretend to do so. It should be construed in the light of its evident purpose. That parts of such strip might be inaccessible could not change its location. A great portion of it would be inaccessible wherever located. It was around the entire tract of country to be opened to settlement. That tract of country was all the lands ceded by the Cherokee Nation of Indians and by act of congress declared to be the country *commonly known and called the "Cherokee Outlet."* An inspection of the map filed in the case will show that there could be no other "entire tract of country." If we consider the entire tract of country as that portion of the Outlet actually opened to homestead settlement, or the remainder of the Cherokee Outlet as diminished by reservations and exceptions, then there are several entire tracts which are entirely surrounded by reservations such as Indian allottments, which are not only reserved for the use of, but the title to which is absolutely vested in the Indians. It seems that no such construction could be based upon anything but a direct or inferential distinction between the various reservations within the Cherokee Outlet or the "entire tract of country opened to settlement."

3rd. The pen map of the Cherokee Outlet

which is made part of the decision complained of designates five certain reservations as not being within the country opened to settlement. This leaves more than one hundred other reservations, many of them of the same class and character of title, bordering upon the outer boundaries of the lands designated upon this pen map as the "lands opened to settlement." The reservations designated on the pen map are those from which persons made the run for lands, despite the efforts of the soldiers, under direction of the Secretary of the Interior to keep them out. *If persons had made the run from any of the other border reservations, for instance the Saline Reservation, the College or School Reservations or the Pawnee Allottments*, why could not the map be made to exclude them from the "lands opened to settlement?" And again, if no persons had succeeded in evading the search of the soldier upon the five reservations now designated upon the pen map, what would there be in the session, the act of congress or the proclamation to justify their exclusion from the "entire tract of country to be opened to settlement?" The proclamation does not pretend to make any distinction, and the nature and purpose of the various reservations, and the character of the title by which they are held does not appear to justify it. If it be said that all reservations were excluded from the "entire tract of couutry to be opened to settlement,"

it will be readily seen that there are various tracts of homestead lands entirely surrounded by reservations, and instead of there being an opening of one entire tract of country there would be an opening of several small tracts and the one hundred foot reservation would be around each and all of these various tracts. In no other way could the one hundred foot reservation be placed directly contiguous to the homestead lands. If we include in the reservations those of sixty feet along every section line, for purposes of public roads, then the one hundred foot boundary would be around every section of land in the Cherokee Outlet.

The majority of the court appear to be of the opinion that by placing the one hundred foot reservation where it is contended for by Appellee that it would be contiguous to the homestead lands on all sides, but this would be to place more than two-thirds of the strip along the main channel of a large river, and make it entirely inaccessible and more than one-half of the remainder would be many miles from the homestead lands by reason of the Indian allottments and other reservations immediately within the boundaries of what is designated upon the pen map as the lands opened to settlement.

The same suggestions apply to the statement of the court that the one hundred foot strip, if placed where it is contended by Appellee that it should be,

would be public lands, while to place it at the ninety-sixth degree would be putting it upon an Indian Reservation. A consideration of the map will show that there would be almost, if not quite, as many miles of this strip upon Indian allottments which are held by a higher class of title than the reservations designated upon the pen map. In fact the Indians have no title to the Chilocco School Reserve, while all allotments are held by patent from the United States, with only a restriction upon the power to sell and convey.

The session and act of congress describe the lands to be opened to settlement by meets and bounds, and the proclamation, after setting forth the same description and designation, declares that *all of said lands* shall be opened to settlement, save and except several hundred reservations, some bordering on the outer boundary of the main tract and others in the interior thereof. If we ignore this as being the description of the lands opened to settlement, and also referred to as the country known as the Cherokee Outlet, we set aside a plain and unmistakable guide as to what is referred to in the proclamation as the Cherokee Outlet and the "entire tract of country to be opened to settlement under this proclamation," and attempt to substitute speculation or supposition in lieu of certainty.

Under almost an identical state of facts, this

court, in Smith vs. Townsend, declared that it was evidently the intention to deal with the tract of country as an entirety, and we think that the language of the session, the act of congress, and the proclamation of the President did deal with the Cherokee Outlet as an entirety, and the officers of the government in all departments so understood and construed the law and compelled Appellant and many thousands of other home seekers to comply with that construction.

The congress and President were not so much concerned about the distance that any person might have to run to reach the land desired as to secure absolute fairness in the great race and a universal understanding of the manner of securing a home in compliance with the law, and even if the construction of the law at that time enforced had not been fully warranted by the language thereof, that construction could not afterward be changed without doing violence to the rights of every one of the hundred thousand or more who observed it, and thereby fixing a reward upon the defiance of the law and the constituted authority of the government by the very few who receive the benefits of the new construction.

We think this court was misled by the pen map contained in the opinion of the Supreme Court of the Territory, and that a more careful consideration will convince the court that the "entire tract of country to

be opened to settlement" and the "country known as the Cherokee Outlet" are one and the same. That entry upon any part thereof was prohibited by the act of 1889 and 1893. That all of that entire tract was dealt with and declared open to settlement, and that all lands within the outer boundaries thereof which were not to be occupied for homestead purposes were excepted in the proclamation, regardless of the character of title or the purpose for which reserved, or whether such exceptions referred to large or small tracts of land. That the proclamation warned all persons of the prohibition against entering thereon, and then, on account of the fact that lands adjoining the outer boundaries of the Cherokee Outlet were, in some instances, owned by individuals who might sell special privileges to homeseekers able to buy the same, permission was given to enter upon any part of the Cherokee Outlet to the extent of one hundred feet and no more. Such was the construction of the law by those in authority at the time it was passed, and who framed the very language they were called upon to construe, which construction was enforced by the soldiers of the United States until all that could be lost or gained by that construction had been suffered or acquired. It was a question of a fair race for a home, and when the race is over the awards should be in accordance with the rules of the race. To change the rules which governed this great struggle for a

home long after the race was ended, and to take from those who had fairly won under the rules then enforced, not only their lands but years of labor and thousands in money expended in improvements merely because a different rule now appears to be more equitable, is to sacrifice all the fruits and purposes of equity to the shadow of its name.

To briefly recapitulate we suggest that in case of doubt as to the construction of the law in the case, the rule of contemporaneous construction should be controlling, and the present case calls for the application of the rule.

The pen map is based upon a supposed distinction between reservations within the Cherokee Outlet or the "entire tract of country opened to settlement."

Such reservations are all of the same class, and are all excepted from an entire tract or body of land because they are all included within the outer boundaries of that tract as defined and set forth in the session, the act of congress, and the proclamation of the President.

The majority of the court determines a supposed boundary to the entire tract dealt with by process of construction or supposition as to the intention of the President, and disregard a plain and specific boundary description.

The court assumes that the one hundred foot reservation was not at the eastern boundary of the Cherokee Outlet because it would be on an Indian reservation, and that it is where Appellee contends that it is because it would be contiguous to the homestead lands, when in fact the supposition places a large portion of the hundred foot strip in the middle of a large river and the greater portion of the remainder upon Indian allotments many miles from homestead lands.

The court, in effect, holds that it would be equitable to construe the law as contended for by Appellee, but overlooks the fact that the fruits of the rule would be most inequitable applied and bestowed, since the close of the race put an end to the power of Appellant to avail himself of such a rule.

The court supposes a tract of country opened to settlement different from the tract of country declared to be opened, and defined in the session, the act of congress, and, by reference, in the proclamation itself.

All that is said by the court with reference to the supposition that the President did not intend to set apart a one hundred foot reservation on the Indian Reservation applies with equal force to the Indian allotments of the Pawnees and others upon which the one hundred foot strip would be if the supposition is

upheld.

The court sees in the language in reference to the one hundred foot strip being around and immediately within the outer boundaries of the entire tract to be opened to settlement a purpose to prevent any one from going upon a reservation for school or county purposes, but there is no more reason why a permission should be read into the act and proclamation to go upon an Indian Reservation, a Saline Reservation or an Indian allotment. It must have been the intention to have a straight line upon a definite boundary.

The Chilocco Reservation and the other Indian Reservations west of the river were even included in the Perry Land District. We are at a loss to understand why part of the reservations within the defined outer boundaries of the main tract opened to settlement are to be considered outside thereof for the purpose of determining the point of starting on the race and others of the same class and character, reserved from settlement in the same language and manner, are to be considered therein. The court must have been misled by the pen map set out in the opinion of the Supreme Court of the Territory.

The court is in error about there being one or two contradictory orders sent out about the time of opening the country in reference to the outer boundaries. There are scores of letters and telegrams, as appears

from the records in the land department, and many of them are referred to in the case of Cagle vs. Mendenhall. The orders were all to the same effect, and all directed that persons would not be allowed to enter from an Indian Reservation. The soldiers, as appears from the official report of the Secretary of War, removed all persons from the borders of these reservations on the west. These matters are universally known, and this court should take judicial knowledge of these facts, under authority of Smith vs. Townsend, 148 U. S., 490.

It is true that parties who made the race from the reservations were not allowed a hearing upon the question of the proper starting point, but these parties had not made the race at the time the opinion of the Secretary of War, the Secretary of the Interior, the Commissioner of the General Land Office and the Assistant Attorney General in charge of the question, as well as the local officers in charge of the opening, were made public. The rights of the parties relates back to the beginning. All parties were fully aware of the act and proclamation as well as the opinions of the officers of the government in reference to the proper construction thereof. To disregard the orders of the officers in charge of the opening, which orders were made pursuant to the contemporaneous construction of the law by all officers whose duty it was to construe it, meant to lose the homestead right, but

for the accident of a successor in the office of Secretary of the Interior who might entertain different views as to the meaning of the men who had construed their own language.

Again, if it is to be said that the President could not have intended to place the one hundred foot strip along the outer boundaries of the country known as the Cherokee Outlet because it can not be presumed that he intended to give permission to go upon an Indian Reservation, why shall this benefit the Appellee, who did not go upon the one hundred foot strip at all, but upon an Indian Reservation? The President did not give permission to go upon all of the Indian Reservations. If it can not be presumed that he would permit a trespass upon a strip one hundred feet in width upon an Indian Reservation it certainly can not be claimed that the failure to give such a limited permission amounts to an unlimited permission to go upon the entire reservations. The record of this case shows that Appellee did not claim to have started from a one hundred foot strip, but from the reservation itself. The Prohibition against going upon any part of the lands in the Cherokee Outlet is contained in the act of congress, and the permission of the President was to go upon a oue hundred foot strip *somewhere*. Wherever the one hundred foot strip was located the Appellee was disqualified under the plain letter of the law, as well as the spirit and purpose

thereof, because he was upon prohibited territory for the purpose of gaining an advantage, and whatever his reason might have been for not occupying the reservation of one hundred feet, even if it was located as the court has found, it is sufficient that he failed, at the time of opening the country to settlement, to possess one of the qualifications of a homestead settler.

See Smith vs. Townsend, 148 U. S. 490.

All persons interested in this litigation are those who have resided upon and cultivated and improved these lands since the opening of the Cherokee Outlet to settlement, September 16th, 1893. It is not a question of "claim jumping" or speculation. Appellant and his associates in this litigation have expended their labor and money in the improvement of their homes, believing that the government would not finally disown them for having respected and complied wish its laws, as construed by its executive department and enforced by its soldiers. Still believing that our cause is just, and earnestly praying that a re-hearing of the above cause may be had, the foregoing suggestions are,

Very respectfully submitted,

S. H. HARRIS,

J. J. DARLINGTON,

Counsel for Appellant.